

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 5, 2013

v

JONATHAN EARL JEFFERSON,

Defendant-Appellant.

No. 309755
St. Clair Circuit Court
LC No. 11-002935-FH

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

While I concur with the majority's treatment of several of the issues raised in this appeal, I respectfully dissent from its analysis and conclusions regarding the admissibility of defendant's 16-year-old armed robbery conviction for impeachment purposes. Because admission of the prior conviction was clearly erroneous under MRE 609 and binding caselaw, and because the error was not harmless, I would reverse defendant's convictions for felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and remand for a new trial.¹

MRE 609 provides:

(a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

* * *

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

¹ I concur with the majority as to the other issues raised by defendant on appeal.

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

(b) For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

This Court described the analytical framework necessary to determine the admissibility of evidence under MRE 609 in *People v Snyder (After Remand)*, 301 Mich App 99, 105; 835 NW2d 608 (2013), noting that, “*MRE 609 creates a presumption that prior convictions are inadmissible to impeach a witness’ credibility.*” (Emphasis added). *Snyder* went on to describe the legal standards relevant to the application of MRE 609 to theft offenses:

As a first step, regardless of whether the witness is the defendant himself, the court is required to determine that the proffered prior theft crime conviction has “*significant* probative value on the issue of credibility.” MRE 609(a)(2)(B) (emphasis added). “For purposes of [this] probative value determination . . . the court shall consider only the age of the conviction and the degree to which the conviction of the crime is indicative of veracity.” MRE 609(b). Regarding the age of the conviction, as a general matter, the older a conviction, the less probative it is. See *People v Meshell*, 265 Mich App 616, 636; 696 NW2d 754 (2005). Regarding “the degree to which a conviction of the crime is indicative of veracity,” our courts have not held that theft crimes are inherently of “*significant* probative value on the issue of credibility.” MRE 609(a)(2)(B) (emphasis added). Rather, our courts have held that, in general, “[t]heft crimes are minimally probative on the issue of credibility,” *Meshell*, 265 Mich App at 635, or, at most, are “moderately probative of veracity.” [*People v*] *Allen*, 429 Mich [558,] [] 610-611[]; 420 NW2d 499 (1998)]. [*Snyder*, 301 Mich App at 105-106].

It is clear that in determining the probative value of a prior conviction, we may “consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity.” MRE 609(b). In the instant case, there is little question as to the first fact, i.e., the age of the conviction. Like the trial court, the majority makes little mention of this fact and essentially concedes that the age of the conviction, i.e., 16 years old, militates against its probative value.

The second factor is the degree to which the conviction of the crime is indicative of veracity. As noted above, it is well-settled that theft crimes are *not* inherently of “*significant* probative value on the issue of credibility.” MRE 609(a)(2)(B). Rather, they are generally of minimal, or at most moderate, probative value. See *Meshell*, 265 Mich App at 635; *Allen*, 429 Mich at 610-611. Thus, if a prior theft conviction, particularly one of distant vintage, is to be

admitted for impeachment, the trial court is required to “provide us with [] reasons why the crime or its surrounding circumstances are ‘indicative of veracity.’” *Snyder*, 301 Mich App at 109, quoting MRE 609(b). Here, the trial court failed to do so. It simply stated in conclusory fashion that “the evidence has significant probative value on the issue of credibility.” It offered no reasons why the crime or its surrounding circumstances required, or even allowed for, that conclusion. The majority attempts to mask this failure by providing a lengthy quote from the trial court. However, the quote is merely the trial court’s recitation of the elements of MRE 609; it contains no reasons why this 16-year-old theft offense should be deemed to have significant probative value. The majority also recites the truism that theft offenses are deemed to be of some, rather than *no* probative value. However, the issue is not whether a theft conviction is of no probative value; MRE 609 makes clear that it does have such value. The issue is whether its probative value is sufficiently significant to set it apart from most theft offenses, a question that neither the trial court nor the majority attempt to answer.

Accordingly, given the absence of grounds to conclude otherwise, defendant’s prior conviction was not of “significant probative value” on the issue of his credibility. MRE 609(a)(2)(B). Instead, like most theft crimes, it was merely of minimal or moderate probative value on the issue of credibility, and its age greatly reduced that already low probative value. Defendant’s prior conviction was therefore inadmissible under MRE 609(a)(2)(B) and the trial court abused its discretion by concluding otherwise.

Even if the trial court had provided grounds to conclude that a 16-year-old armed robbery conviction was significantly probative of defendant’s veracity under MRE 609, reversal would still be mandated given the magnitude of the prejudicial effect. MRE 609(b) provides that in determining the extent of prejudicial effect, “the court shall consider only the conviction’s similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify.” Here, the second factor is not at issue given that defendant testified, albeit based on his belief that his stipulation to the fact that he was a convicted felon prohibited from possessing a firearm barred the use of his prior conviction for impeachment purposes. However, where, as here, the charge was the unlawful possession of a firearm, a jury would almost certainly conclude that defendant’s prior conviction for *armed* robbery demonstrated his willingness to use weapons unlawfully.

Finally, the MRE 609 error was prejudicial and so reversal is required. See *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). “[I]n this context, ‘prejudicial’ means that, after examining the error and assessing its effect in light of the weight and strength of the untainted evidence . . . it affirmatively appears that the error asserted undermines the reliability of the verdict.” *Snyder*, 301 Mich App at 111-112 (quotation marks, brackets, and citation omitted). The trial court issued a limiting instruction regarding the jury’s consideration of the prior conviction but, as *Snyder* explained, a limiting instruction is not helpful with regard to improperly admitted prior conviction evidence. 301 Mich App at 112.²

² The majority seeks to minimize *Snyder* by suggesting that the decision may have been due to the panel’s frustration with the trial court’s refusal to articulate the reasons that the defendant’s

Defendant was convicted of felon-in-possession and felony-firearm. The only element at issue was whether defendant possessed a firearm which he gave to the complainant at her home. There was no physical evidence linking defendant to the firearm. Two witnesses, including the complainant, testified that defendant possessed the firearm at the complainant's home at a certain date and time. Defendant testified that he was not present at the complainant's home at that time and that he never asked the complainant to hide a firearm for him. The defense presented two other witnesses who also testified that defendant was elsewhere at the time he was alleged to have been at the complainant's home. Thus, whether defendant possessed a firearm was purely a question of witness credibility. Given the absence of physical evidence and the conflicting testimony from multiple witnesses, I do not believe that we can conclude that the jury's knowledge of defendant's prior armed robbery conviction was harmless. See *id.* at 112-113.

Accordingly, I would reverse and remand for a new trial.

/s/ Douglas B. Shapiro

prior conviction was of probative value after two remand orders. However, if that were so, the panel would just have assumed that the conviction was wrongly admitted and determined whether or not the error was harmless. It did not do so. Instead, *Snyder* addressed in detail the substantive application of MRE 609 to the conviction at issue:

However, even assuming, arguendo, that the trial court had made findings responsive to our remand order and concluded that evidence of defendant's prior larceny conviction was of significant probative value on the issue of credibility, *we would still conclude that the prejudicial effect of the evidence of the defendant's prior conviction outweighed its probative value.*

* * *

In summary, we conclude that evidence of defendant's prior conviction was inadmissible because it is not of "significant" probative value on the issue of his credibility and therefore fails to meet the requirements for admissibility under MRE 609(a)(2)(B). Although our analysis could cease here, we also conclude that even assuming arguendo that evidence of defendant's prior conviction was of significant probative value, its probative value was outweighed by its prejudicial effect and the evidence should not have been admitted. [*Id.* at 110-111 (emphasis added).]

Thus, *Snyder* held that (a) the prior conviction was not of significant probative value; (b) its limited probative value did not outweigh its prejudicial effect, and; (c) its erroneous admission was not harmless. *Id.* at 109-113. We are bound by that analysis. MCR 7.215(C)(2).